U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of JOE E. McGEE and U.S. POSTAL SERVICE,
POST OFFICE, Pelham, AL

Docket No. 02-664; Submitted on the Record;
Issued August 1, 2003

DECISION and ORDER

Before COLLEEN DUFFY KIKO, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant sustained a recurrence of disability on or about April 13, 1998 as a result of his February 6, 1996 employment injury.

On February 6, 1996 appellant, then a 50-year-old postal clerk, injured his back at work while pushing a container full of magazines and bulk mail. The Office of Workers' Compensation Programs accepted his claim for lumbar strain and a herniated nucleus pulposus (HNP) at the L4-5 level. Appellant returned to modified duty on April 22, 1996 working four hours a day. He received compensation for wage loss.

Appellant stopped work entirely on April 13, 1998. After using sick and annual leave, he filed a claim for total disability.

On May 28, 1998 Dr. Michael J. Turner, appellant's attending internist, noted that appellant's HNP had been causing back and radicular pain "which has been aggravated by doing lifting and pulling." Dr. Turner stated:

> "[Appellant] has been trying to perform limited-duty work for over a year now with recurrent problems with back pain. Despite limited duty and trying to limit his activity, the pain has continued to worsen. [Appellant] has now reached the point to where simple activity such as getting up and going to work is causing him to have significant pain.
>
> "For this reason, I am recommending [appellant] pursue full disability. I feel he is unable to continue working secondary [due] to his herniated nucleus pulposus, especially a job, which requires him to do bending and lifting such as the one he currently holds at the [employing establishment]."

On August 6, 1998 Dr. Tuner reported: "Working with his restrictions, [appellant] had constant problems with pain that was becoming progressively worse over time and this is the basis for my recommending that he go on total disability."

On January 19, 1999 Dr. Turner related appellant's history of injury and medical treatment. He noted that, although appellant was working within restrictions, he continued to have pain and discomfort "which was aggravated by his work." Dr. Turner added: "In May of this year, we recommended that [appellant] proceed with full disability. [Appellant] has been off from work since that time and although he continues to have pain in his back, it has improved since he has discontinued working."

Responding to an Office request for an opinion addressing disability, Dr. Turner reported the following on June 7, 1999:

> "I am writing this letter in response to your letter dated June 4, 1999 to [appellant] requesting objective data, on which we based his recommendation that he become disabled. As you are probably aware, [appellant's] original problems started in February 1996. At that time [he] was found to have a herniated lumbar disc. Because of previous surgeries for a different level of herniated disc, [he] decided he did not want to proceed with surgical repair. The patient, at that time, was placed on limited duty. However, because of persistent problems with pain and discomfort in approximately May 1998 we recommended [he] consider full retirement from his present occupation. This was not based on any objective findings, but based on multiple office visits, long discussions with [appellant], a patient I have known for many years. Since [he] has been off work his pain level has improved. [Appellant], as you are probably aware, also has problems with carpal tunnel syndrome, for which he is still undergoing evaluation for possible repair, but with regard to his back his symptoms seem to have stabilized since he has been off work. As I am sure you are aware, there is no objective measurement of pain possible. Repeat MRI [magnetic resonance imaging] [scan] may possibly show worsening of his herniated disc, but even if it was stable would not mean his symptoms had not worsened. If you desire, we can obtain a nerve conduction study, which has never been done, but beyond this I am not certain what objective data you are requesting."

In a decision dated July 13, 1999, the Office denied appellant's claim for wage loss on the grounds that he submitted insufficient medical evidence for the period claimed and that Dr. Turner had cited no objective findings to support his recommendation of total disability.

The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Gordon J. Kirschberg, a neurologist. The Office asked Dr. Kirschberg whether appellant's current back conditions were related to his February 6, 1996 lumbar strain and HNP at L4-5. The Office also asked whether appellant was able to perform the physical requirements of his date-of-injury position as a postal clerk.

On September 17, 1999 Dr. Kirschberg related appellant's history of injury, treatment and complaints. He advised as follows:

> "In answer to your specific questions, the patient has some L5 sensory loss and denervation in the L5 muscles on the EMG [electromyogram] that do objectively substantiate that his back condition is related to the herniated disc at L4-5 of February 6, 1996. A combination of some weakness and pain along with the results of the FCE that was done a year ago seemed to show that the worker is unable to perform the physical requirements of his job. I would keep his work limitations as they were on the FCE [functional capacity evaluation] of June of 1998 because nothing has changed treatment wise and he does have a herniated disc with some L5 radiculopathy. I recommend at this point an up-to-date MRI [scan] be obtained and if in fact the disc is an operable disc, it should be surgically taken care of, which should alleviate his problem."

An MRI scan on October 18, 1999 showed that appellant had degenerative disc disease throughout the lumbar spine, worse at L2-3, 3-4 and 4-5. The radiologist noted: "There are bulges of disc at 3-4, 4-5 and L5-S1 but I see no frank herniated disc or stenosis."

In a decision dated May 31, 2000, an Office hearing representative affirmed the denial of appellant's claim, finding that the medical evidence failed to establish that there was a material change in the nature and extent of appellant's employment-related low back condition rendering him totally disabled from performing the duties of his modified position.

The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Samuel Chastain, a neurologist, for an opinion on whether appellant's current medical conditions were causally related to the accepted conditions of lumbar strain and HNP at L4-5.

On August 21, 2000 Dr. Chastain reported that he believed that appellant's limiting factor was his perception of pain, for which an objective neurologic evaluation would not be very helpful. He advised the Office that appellant be evaluated in a multi-specialty pain clinic environment that would include perhaps neurology, neurosurgery, orthopedic pain specialist and psychiatrist or psychologist: "This would be the only way that this would be satisfactorily resolved."

The Office referred appellant, together with the medical record and a statement of accepted facts, to Dr. Hisham Hakim, a neurologist.

On September 8, 2000 Dr. Hakim related appellant's history and findings on examination. He diagnosed chronic lower back pain, carpal tunnel syndrome and status post lumbar laminectomy in 1991. Dr. Hakim concluded:

> "The claimant has chronic low back pain felt to be moderate in nature. It does have a radicular component but does not appear to be a prominent feature on examination. I believe his symptoms are a combination of his previous injury in 1991 and his surgery and the injury he had at work in 1996. The test, which included the MRI [scan] as well as the EMG, failed to demonstrate significant

pathology such as a disc herniation or significant canal stenosis or neural foraminal stenosis. The MRI [scan] finding is compatible with degenerative changes at multiple levels as well as bulging disc disease."

Dr. Hakim completed a work capacity evaluation indicating that appellant could work eight hours a day with specified physical restrictions.

Appellant requested reconsideration. In support thereof he submitted a deposition of Dr. Kirschberg taken on August 2, 2000. Dr. Kirschberg testified that he agreed with Dr. Turner's diagnosis of significant disc bulge claudication spinal stenosis of L2-3 as well as mild narrowing of the L4-5 neuroforamina, both of which were consistent with appellant's description of radiating back pain. He testified that appellant was currently not able to perform his modified position. Dr. Kirschberg also agreed with Dr. Turner's recommendation of total disability based on significant pain and discomfort in trying to perform those duties for four hours a day. He explained that there was no objective way to quantify appellant's pain complaints, of which he considered credible.

In a decision dated February 22, 2001, the Office found the evidence submitted to be cumulative and denied a merit review of appellant's claim.

Appellant again requested reconsideration. He submitted evidence to support that an MRI scan on May 24, 2001 now showed disc herniation at L4-5, whereas a previous MRI scan showed a disc bulge. Dr. Turner reported on June 8, 2001: "I feel this is the reason for [appellant's] worsening symptoms."

In a decision dated October 12, 2001, the Office denied modification of its prior decisions. The Office found that the evidence submitted provided no medical rationale or objective findings to support total disability beginning in May 1998 in relation to the work injury of 1996. The Office noted that Dr. Turner presented no evidence to show that appellant's condition worsened to the point that he could no longer perform his modified duty. The Office further noted that an MRI scan obtained on October 18, 1999, after appellant stopped working, showed disc bulges but no frank herniated disc or stenosis.

The Board finds that appellant has not met his burden of proof to establish that he sustained a recurrence of disability on or about April 13, 1998 as a result of his February 6, 1996 employment injury.

When an employee who is disabled from the job he held when injured on account of employment-related residuals returns to a limited-duty position or the medical evidence of record establishes that he can perform the limited-duty position, the employee has the burden to establish by the weight of the reliable, probative and substantial evidence a recurrence of total disability and to show that he cannot perform such limited-duty work. As part of this burden, the employee must show a change in the nature and extent of the injury-related condition or a change in the nature and extent of the limited-duty job requirements.[1]

[1] *See Terry R. Hedman*, 38 ECAB 222, 227 (1986).

After his February 6, 1996 back injury, appellant returned to modified duty working four hours a day. He stopped work on April 13, 1998, used sick and annual leave and filed a claim for total disability. He does not argue that the requirements of his modified position changed such that he could no longer perform the duties of that position. Rather, he contends that he experienced a change in the nature and extent of his injury-related condition.

In May 1998 Dr. Turner recommended total disability and retirement not on the basis of objective findings – he reported there were none – but on the basis of persistent pain and discomfort, multiple office visits, long discussions and his relationship with appellant for many years.

Whether a particular injury causes an employee to become disabled for work and the duration of that disability, are medical issues that must be proved by a preponderance of the reliable, probative and substantial evidence.[2] Generally, findings on examination are needed to justify a physician's opinion that an employee is disabled for work.[3] The Board has held that when a physician's statements regarding an employee's ability to work consist only of a repetition of the employee's complaints that he or she hurt too much to work, without objective signs of disability being shown, the physician has not presented a rationalized medical opinion on the issue of disability.[4]

Dr. Turner's reports are insufficient to establish the claimed recurrence of disability. Although he attributed the worsening of appellant's pain and discomfort to the lifting, pulling and bending required of his limited duty, he offered no objective findings to substantiate such an aggravation or to show a change in the nature and extent of appellant's injury-related condition. His opinion on appellant's ability to work essentially constitutes a repetition of appellant's complaint that he hurt too much to work. Dr. Turner also failed to account for role played, if any, by appellant's previous surgeries at a different level, and he neglected to address the MRI scan on October 18, 1999, which showed degenerative disc disease throughout the lumbar spine with disc bulges at multiple levels but no frank disc herniations or stenosis. Under the circumstances, the Board finds that Dr. Turner's opinion lacks sufficient rationale to establish a worsening of appellant's injury-related condition by April 13, 1998.[5]

Dr. Kirschberg, the Office referral neurologist, reported on September 17, 1999 that appellant had some L5 sensory loss and denervation in the L5 muscles on an EMG "that do objectively substantiate that his back condition is related to the herniated disc at L4-5 of February 6, 1996." He did not explain how the L5 sensory loss and denervation in the L5

[2] *Edward H. Horton*, 41 ECAB 301 (1989).

[3] *See Dean E. Pierce*, 40 ECAB 1249 (1989); *Paul D. Weiss*, 36 ECAB 720 (1985).

[4] *John L. Clark*, 32 ECAB 1618 (1981).

[5] *See generally Melvina Jackson*, 38 ECAB 443, 450 (1987) (discussing the factors that bear on the probative value of medical opinions). On June 8, 2001 Dr. Turner pointed to an MRI scan on May 24, 2001, which showed a disc herniation at L4-5, and stated: "I feel this is the reason for [appellant's] worsening symptoms." Evidence of an L4-5 disc herniation on May 24, 2001, however, does not explain why appellant was unable to continue limited duty on April 13, 1998, particularly in light of diagnostic testing on September 8, 2000, which failed to demonstrate significant pathology such as a disc herniation.

muscles represented a change in the nature and extent of appellant's injury-related condition. Moreover, the MRI scan obtained on October 18, 1999, at his recommendation, showed no frank herniated disc at L4-5. It did show degenerative disc disease throughout the lumbar spine with disc bulges at multiple levels, which Dr. Kirschberg did not address. Dr. Kirschberg later agreed with Dr. Turner's recommendation of total disability based on significant pain and discomfort in trying to perform limited duties for four hours a day, but he acknowledged that there was no objective way to quantify appellant's complaints of pain. Although he considered these complaints to be credible, the Board finds that Dr. Kirschberg's opinion lacks sufficient rationale to establish a worsening of appellant's injury-related condition by April 13, 1998. Appellant has not met his burden of proof.

The October 12, 2001 decision of the Office of Workers' Compensation Programs is affirmed.[6]

Dated, Washington, DC
August 1, 2003

Colleen Duffy Kiko
Member

David S. Gerson
Alternate Member

Michael E. Groom
Alternate Member

[6] The Office's October 12, 2001 review of the merits of appellant's claim renders moot the February 22, 2001 denial of reconsideration.